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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LEE CARR, Defendant and Appellant.	C061897 (Super. Ct. No. CRF063937)

In this tragi-comedy of errors, we witness three inexplicable missteps. First, part of a state search warrant affidavit was not timely produced in federal court, leading to the dismissal of federal charges that would have obviated the need for this state prosecution. Second, either federal authorities did not promptly notify state authorities of the dismissal, or the state authorities did not promptly act, leading to the filing of facially time-barred state charges.

Third, defendant's attorney did not notice the problem, either before or after a jury trial, thereby necessitating this appeal.

A jury convicted defendant Michael Lee Carr of possession for sale of methamphetamine and maintaining a place for narcotics activities, and found he was personally armed and a principal was armed. (Health & Saf. Code, §§ 11378, 11366; Pen. Code, § 12022, subds. (a)(1) & (c); further unspecified section references are to the Penal Code.) The trial court sentenced defendant to prison for six years, and defendant timely appealed.

On appeal, defendant contends the charges are time-barred, the judgment must be reversed and the charges must be dismissed. The Attorney General concedes the judgment must be reversed, but contends the matter must be remanded for a hearing to determine if facts exist that would make the prosecution timely. We agree with the Attorney General on the latter point. Accordingly, we reverse and remand with directions to conduct a hearing to determine whether the charges are time-barred.

BACKGROUND

On June 12, 2003, defendant was arrested on unrelated charges. Later that day, officers executing a search warrant found narcotics and related items, including firearms, at a warehouse in Woodland.

On June 16, 2003, a felony complaint was filed against defendant and John Craig Nowell.[1]

On July 14, 2003, Nowell was arraigned, but defendant's case was dismissed because federal charges were filed.[2]

Federal charges were dismissed on April 7, 2006, because of a discovery problem. Specifically, the search warrant affidavit referenced a sealed statement by a confidential informant, but that sealed statement was not timely produced in federal court. According to the prosecutor in this case, the missing document "had been left behind when the case had been sent to the Federal Court." Exactly how this document came to be "left behind" is unexplained in the record.

On July 11, 2006, a state court complaint was filed alleging that defendant and Nowell possessed methamphetamine for sale, maintained a place for narcotics sales and conspired to sell methamphetamine, while armed. A warrant for defendant's arrest was issued on July 21, 2006.

The record sheds no light on why the new complaint was not filed immediately, and the arrest warrant obtained promptly, upon the dismissal of federal charges, three months previously.

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[1] Nowell is not a party to this appeal. According to defendant's probation report, Nowell pled no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and was granted probation.

[2] The Attorney General states defendant was also arraigned that day. Defendant disputes this, and seeks judicial notice of a minute order. We deny the request for judicial notice. Whether or not defendant was arraigned that day would not change the result on appeal. It would toll the limitations period for one day. (See § 803, subd. (b).) That day, of itself, is not enough time to salvage this prosecution.

Before trial, defense counsel unsuccessfully claimed an alleged speedy trial violation, but did not raise a statute of limitation claim.

On December 17, 2008, an information was filed charging defendant with possession for sale of methamphetamine (count 1, Health & Saf. Code, § 11378), and maintaining a place for narcotics activities (count 2, Health & Saf. Code, § 11366), and the information alleged two firearm enhancements, that defendant was personally armed and that a principal was armed (§ 12022, subds. (a)(1) & (c)).

Defendant exercised his right to self-representation at trial, and the jury convicted him as charged. At trial, the People produced evidence defendant operated a warehouse in Woodland, protected by surveillance cameras, and when it was searched pursuant to a warrant on June 12, 2003, peace officers found police radio scanners, several loaded firearms, a safe with $9,500, indicia of narcotics sales, and over 800 grams (about 1.75 *pounds*) of methamphetamine.

After reappointing counsel to represent defendant, the trial court sentenced defendant to state prison for six years, and defendant timely appealed.[3]

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[3] The trial court did not impose sentence on count 2. This was due to an incorrect implementation of section 654. (See *People v. Pearson* (1986) 42 Cal.3d 351, 359-360.) If the trial court finds the case timely, it must impose and stay a sentence on count 2 and its pendent enhancement.

DISCUSSION

For the first time on appeal, defendant contends the case must be dismissed because the charges are time-barred. The Attorney General concedes defendant can raise this issue for the first time on appeal and concedes the judgment must be reversed, but contends we should remand for a hearing to determine whether the charges are time-barred. We agree with the Attorney General that the matter must be remanded for a hearing.

We accept the Attorney General's concession that defendant may raise this issue for the first time on appeal. The California Supreme Court has held that "when the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time." (*People v. Williams* (1999) 21 Cal.4th 335, 341 (*Williams*); see *People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1658 (*Whitfield*).) Accordingly, defendant did not forfeit his claim by failing to raise it in the trial court.[4]

The Attorney General concedes the information indicates on its face that the action is time-barred. We agree. Generally, a felony prosecution "shall be commenced within three years after commission of the offense." (§ 801.) A longer period is provided for felonies punishable "for eight years or more" (§ 800), but in calculating the punishment for an offense,

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[4] Another court has urged the Legislature to change the rule stated in *Williams*, and adopt a forfeiture rule in these circumstances. (*People v. Le* (2000) 82 Cal.App.4th 1352, 1362.) However, the Legislature has not changed the *Williams* rule.

enhancements are not counted. (§ 805, subd. (a).)[5] The maximum punishment for the felonies charged in the information was three years. (§ 18; Health & Saf. Code, §§ 11366, 11378.) The information, filed on December 17, 2008, alleges crimes committed on or about June 12, 2003.

The California Supreme Court has held: "If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing." (*Williams*, *supra*, 21 Cal.4th at p. 341, fn. omitted.)

The Attorney General contends we should remand for a hearing, but does not articulate any factual grounds that would make this prosecution timely. The Attorney General mentions a factual uncertainty about the existence and date of a prior arrest warrant, but explains that, however such uncertainty is resolved, the prosecution would still be time-barred.

Because the Attorney General does not identify a *material* factual uncertainty, defendant asserts the appropriate remedy is to reverse with directions to dismiss the case.

However, we conclude there are facts that may exist that would toll the statute of limitations and therefore make the prosecution timely. Because defendant did not raise the issue below and thus permit a full adversarial exposition of it, and,

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[5] Different periods are provided for some other offenses, not charged in this case. (§§ 799, 801.1-801.6; see Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2009) § 19.14, p. 518.)

thus, we cannot tell from this record whether such facts exist, we remand for a hearing to resolve the matter.

For purposes of timeliness, a felony prosecution is commenced in three ways; when an information or indictment is filed, when a defendant is arraigned on a felony complaint, or when an arrest warrant or bench warrant is issued. (§ 804.)[6]

As relevant here, a prosecution commences when an arrest warrant is issued, not when an arrest is made. (§ 804, subd. (d); *People v. Angel* (1999) 70 Cal.App.4th 1141, 1145-1146 (*Angel*).)

Accepting the Attorney General's math, the arrest warrant issued on July 21, 2006, commenced the prosecution three years and 39 days after the crimes, committed on or about June 12, 2003, as alleged in the information. Thus, these proceedings commenced more than a month late.

But we must also consider whether any tolling provisions apply that would show the action was commenced timely.

Section 803, subdivision (b) provides: "No time during which prosecution of the same person for the same conduct is

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[6] Section 804 provides in full: "Except as otherwise provided in this chapter, for the purpose of this chapter, prosecution for an offense is commenced when any of the following occurs: [¶] (a) An indictment or information is filed. [¶] (b) A complaint is filed charging a misdemeanor or infraction. [¶] (c) The defendant is arraigned on a complaint that charges the defendant with a felony. [¶] (d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint."

pending in a court of this state is a part of a limitation of time prescribed in this chapter."

If a prior arrest warrant had been issued, that would have commenced a prosecution for tolling purposes. (§ 804, subd. (d).) But the Attorney General concedes that "[e]ven if a warrant had been issued on June 12, 2003 [the day of the search], the [initial] action was 'pending' only until it was dismissed on July 14, 2003, 32 days later. Assuming the 'pending' action tolled the statute for 32 days (Pen. Code, § 803, subd. (b)), it was still commenced seven days late." We agree.

The Attorney General concedes the federal prosecution did not toll the time, because it was not an action "pending in a court of this state" as required by section 803, subdivision (b), quoted above. We agree. As we have said before, section 803, subdivision (b) was "part of a comprehensive revision of the provisions governing the time of commencing criminal actions." (*Whitfield*, *supra*, 19 Cal.App.4th at p. 1660.) In a report recommending that comprehensive revision, the language "pending in a court of this state" is discussed as follows: "It should be noted that subdivision (b) provides tolling only for a prosecution pending in state, not federal, court." (Recommendation: Statutes of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Report (1984) p. 321; see *Angel*, *supra*, 70 Cal.App.4th at p. 1148.)[7]

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[7] Ironically, the chair of the Law Revision Commission, and the author of the letter submitting this report to the Governor,

Because the phrase "court of this state" (§ 803, subd. (b)) plainly indicates a court authorized by or acting under the authority of "this state," we accept the Attorney General's concession that the phrase excludes a federal court.[8]

However, a criminal action is also tolled when a defendant leaves the state, or becomes a fugitive. (§ 803, subd. (d); see 1 Witkin, Cal. Crim. Law (3d ed. 2000) Defenses, § 229, p. 599; *People v. Abayhan* (1984) 161 Cal.App.3d 324, 331-333.)

The record on appeal does not show whether or not defendant left the state or was a fugitive during any period of time, because the statute of limitations issue was not raised in the trial court. Accordingly, we disagree with defendant's claim that we *must* reverse with directions to dismiss the action. Instead, because we "cannot determine from the available record whether the action is barred," we "should remand for a hearing." (*Williams*, *supra*, 21 Cal.4th at p. 341, fn. omitted.)

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was David Rosenberg, now a Yolo County Superior Court Judge -- the trial judge in this case. (See 17 Cal. Law Revision Com. Report, *supra*, at p. 303.) Had the statute of limitation issue been raised in the trial court, Judge Rosenberg would have been well able to resolve the issue, thereby obviating the need for this appeal.

[8] However, we do not understand the policy behind the legislative choice to limit tolling to pending *state* cases. Because application of that peculiar limitation, as in this case, may result in dismissal of felony charges without any apparent corresponding societal benefit, we respectfully encourage the Legislature to reconsider the wisdom of this limitation.

DISPOSITION[9]

The judgment is reversed and the cause is remanded with directions to conduct a hearing to determine whether the charges are time-barred. If so, the trial court shall dismiss the case. If not, the court shall modify the judgment by imposing and then staying a sentence on count 2 and its pendent enhancement, and shall reinstate the judgment as so modified. (See fn. 3, *ante*.)

NICHOLSON, J.

We concur:

SCOTLAND, P. J.

SIMS, J.

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[9] If the judgment is reinstated as modified, the recent amendments to Penal Code section 4019 would not change defendant's credit award, because the jury found he personally used a firearm, a circumstance which disqualifies him from the new credit formula. (Pen. Code, §§ 1192.7, subd. (c)(8), 4019, subds. (b)(2), (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)